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Tuesday, August 22, 2006

Conservation of rights

Under the first sale rule, a patented or copyrighted work can be resold without the permission of the patent or copyright holder. For example, if you buy a book you can give it away or resell it without getting permission from the publisher, even if the book contains a copyright notice that purports to forbid this. Similarly, if you buy a patented widget, you can generally resell it without the permission or against the objections of the patent owner. The first sale is said to exhaust the rights of the patent holder over that object.

The Federal Circuit court in the United States has held that for patents the first sale rule does not apply to copies, including seeds based on purchase of the parent seed:

> The fact that a patented technology can replicate itself does not give a purchaser the right to use replicated copies of the technology. Applying the first sale doctrine to subsequent generations of self-replicating technology would eviscerate the rights of the patent holder.

Furthermore, the Federal Circuit held that the farmer had no implied license to use the daughter seeds, because Monsanto's license to the wholesaler restricted this use and "a seller cannot confer broader rights via an implied license than it has been granted by the patent holder."

This latter is based on a general principle of the common law of property: you can't grant more than you own. There is an interesting exception to this principle for financial property (negotiable instruments).

The idea at work here might be called a conservation of property rights: you can't sell what you don't own and you can't take back what you have sold. It is a sensible principle that greatly simplifies the legal relationships we have with each other. However, this case, and some other recent cases providing for exceptions to the first sale rule, seems to give rise to a new and odd violation of rights conservation. A patent owner can lose its rights over an object, but later they can re-appear again. Here, the patent owner Monsanto lost its residual rights of control over the seeds when it sold them, via the first sale doctrine. But then, when the farmer grew the seeds and planted the daughter seeds, the patent owner's rights suddenly re-appeared.

For the case of seeds, this paradox can be resolved by treating the daughter seeds as separate objects from the parent seeds. Under this view, what the farmer was doing was the equivalent of manufacturing new widgets rather than simply repairing the same widget (which would not require the patent owner's permission under U.S. law).

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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A more disturbing violation of rights conservation occurs in the issue of national versus international first sale exhaustion. Many countries have a simple rule: the first sale of an object by a patent owner anywhere in the world exhausts that owner's patents covering the object in that country. This was also the view in the majority of federal circuit courts in the U.S. before creation of the Federal Circuit and its monopoly over patent law.

Earlier this year the Federal Ciruit in the Jazz Photo took a different view. Now if you buy, for example, a widget in Japan, paying royalties to the Japanese patent owner in Japan, and then export the widget to the U.S., you still need permission of the U.S. patent owner (usually the very same person with the same kinds of patent claims as the Japanse patent owner). The patent owner's rights over that object disappear upon first sale in Japan but magically re-appear when the object crosses the border into the U.S. This can only be reconciled with conservation of rights by the idea that that the Japanese patent is a different property right than the United States patent, even though they are owned by the same person and protect the same invention. It is as if you drove your car from Virginia to Maryland and the dealer you bought it from came along and repossessed it, because your Virginia title did not give you Maryland title. That would be a very strange and unfortunate world. It is far simpler, and makes for much more secure property rights, to treat property rights as universally conserved even though they are titled by a local authority.

Posted by Nick Szabo at 2:17 PM

1 comment:

TJIC said...

While not liking the rule that patented items that cross borders have to be re-licensed, as it were, is it not, in fact, the case that the Japanese patent and the American patent in your example ARE different rights, each being applied for separately, and each incurring their own cost?

The fact that I can get one of those rights on my new invention X for price Y, or the other right for price Z, or both rights for price Y+Z does make a strong argument...

7:24 AM

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